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8 SURGICAL INSTRUMENT SERVICE COMPANY, INC.

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 SURGICAL INSTRUMENT SERVICE
13 COMPANY, INC.

Case No. 3:21-cv-03496-AMO

Honorable Araceli Martínez-Olgún

13 *Plaintiff/Counter-Defendant,*

14 v.
15 **PLAINTIFF SIS'S EVIDENTIARY
16 PROFFER REGARDING INTUITIVE'S
17 MOTION IN LIMINE #1**

16 *INTUITIVE SURGICAL, INC.,*
17 *Defendant/Counterclaimant.*

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1 Pursuant to the Court's Order (Dkt. 316), Plaintiff Surgical Instrument Service Company,
 2 Inc. ("SIS") makes this pretrial proffer as part of laying the foundation for the challenged statements
 3 placed at issue by Defendant Intuitive Surgical, Inc.'s ("Intuitive") Motion in Limine #1 (Dkts.
 4 289-290). In opposition to this motion, SIS argued that a blanket ruling on the challenged
 5 statements is inappropriate at this time. *Id.* at SIS Opp. pp. 3:22-4:10. Additionally, SIS argued that
 6 many or most of the challenged statements would not be offered for the truth of the matter asserted.
 7 *Id.* at p. 4:11-5:8.¹ Lastly, SIS argued that the challenged statements are admissible as state of mind
 8 evidence under Fed.R.Evid. 803(3)'s exception to the hearsay rule. *Id.* at pp. 5:9-7:3.

9 SIS submits this evidentiary proffer to establish the foundational elements for the state of
 10 mind hearsay exception pursuant to Rule 803(3) applicable to certain identified out-of-court
 11 statements made by hospital representatives to Mr. Keith Johnson. By submitting this evidentiary
 12 proffer, SIS does not withdraw nor does it waive the other arguments referenced above and
 13 presented in opposition to Intuitive's Motion in Limine #1 (Dkt. 289-290).

14 "The state of mind exception to the hearsay rule requires that: (1) the statement was made
 15 contemporaneously with the mental state to be proven; (2) circumstances do not suggest a motive
 16 for the declarant to fabricate or misrepresent his or her thoughts; and (3) the declarant's state of
 17 mind is relevant to an issue in the case." *Consol. Credit Agency v. Equifax, Inc.*, No. CV-03-1229
 18 CAS (CWx), 2005 U.S. Dist. LEXIS 46851, at *6-7 (C.D. Cal. Jan. 26, 2005). As to relevance,
 19 "[s]tatements revealing a person's state of mind may be relevant evidence to show matters such
 20 as... [a] customer's reason for refusing to deal with a supplier or dealer." *Id.* at *7 (quoting 5 Jack
 21 B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.05[2] [a] (Joseph M.
 22 McLaughlin, ed., 2d ed. 2004)); *see also L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, No. 18-
 23 6809-MWF (MRWx), 2023 U.S. Dist. LEXIS 230550, at *8 (C.D. Cal. Nov. 14, 2023) (concluding
 24 that "evidence falls under an exception to the hearsay rule under Rule 803(3) because it is being
 25 used for the purpose of showing customer motive").

26 SIS attaches the Declaration of Mr. Keith Johnson as Exhibit 1. Mr. Johnson was SIS's
 27 Executive Vice President of Sales and Clinical Programs for 14 years. Van Hoven Decl. Ex. 1 at ¶

28 ¹ SIS stands on its arguments contained in the briefing.

1. Mr. Johnson was deposed during the discovery period in this case and he is on SIS's trial witness
 2 list and will be testifying live at trial. Mr. Johnson will testify at trial about his presentations to
 3 prospective hospital customers regarding SIS's EndoWrist refurbishment services, the monumental
 4 interest in that service Mr. Johnson perceived the relevant decision makers at those hospitals
 5 express, and the resulting sales and sales meetings specific to EndoWrist repair that SIS was able
 6 to achieve before Intuitive's intimidation campaign shut down SIS's EndoWrist repair and reset
 7 business. *E.g.*, *id.* at ¶¶ 10-11, 13, 15-16, 18-31. Mr. Johnson will testify that these sales and
 8 meetings were with hospital decision makers, and will testify to the specific timing and
 9 circumstances of each meeting. *E.g.*, *id.* at ¶¶ 12, 18-31. Mr. Johnson will testify that existing
 10 sales of EndoWrist repair to hospitals then stopped as did further sales meetings. *E.g.*, *id.* ¶¶ 18-
 11 21. Mr. Johnson will testify based on his personal knowledge that SIS's customers and potential
 12 customers stated that the reason for ceasing to purchase repaired EndoWrists from SIS or retracting
 13 their previously expressed desire to purchase repaired EndoWrists from SIS was their contracts
 14 with Intuitive and/or Intuitive threat letters. *E.g.*, *id.* at ¶¶ 21-24, 26-31. Mr. Johnson will testify
 15 that SIS was unable to make any further sales for the repair and reset of hospital-owned EndoWrist
 16 instruments after Intuitive's threat letter campaign. *E.g.*, *id.* at ¶¶ 20-31. Mr. Johnson will also
 17 testify that decision makers at various hospitals personally told him the reasons that that they would
 18 no longer be using or would not consider using SIS to service their EndoWrist instruments. *E.g.*,
 19 *id.* at ¶¶ 21-24, 26-31. In sum, Mr. Johnson's declaration confirms that this testimony is being
 20 presented to demonstrate motive and state of mind, not the truth of the matter asserted (*e.g.*, that
 21 Intuitive's contracts did in fact prohibit third-party repair and Intuitive enforced those terms, which
 22 will be established through other evidence at trial).²

23 Hearsay is ultimately a question of the reliability of the evidence offered. And here, the
 24 circumstances do not suggest a motive for the declarant to fabricate or misrepresent his or her
 25 thoughts, but rather, confirm the reliability of those statements. For example, shortly after SIS
 26 entered the EndoWrist repair business, Intuitive put together an "Unauthorized Remanufactured

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 28 ² There is of course ample independent evidence of these facts, including the Intuitive agreements,
 the Intuitive threat campaign, and the testimony of every Intuitive witness to discuss these subjects.

1 Instruments Overview” presentation outlining its corporate program and policies for responding to
2 use of repaired EndoWrists. Van Hoven Decl. Ex. 2 at p. 1; *see also* Van Hoven Decl. Ex. 3 (in
3 September 2019, discussing “formal process for these situations” and seeking “assistance on
4 dealing with SIS”).

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

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12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

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9 [REDACTED] [REDACTED]

10 [REDACTED]

11 [REDACTED] Indeed, one of Intuitive's examples of
12 its corporate policy and process in action was one of SIS's initial customers, Legacy Good
13 Samaritan. *Id.* at pp. 20-21; Van Hoven Decl. Ex. 4; Van Hoven Decl. Ex. 1 at ¶ 23. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

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27 Specifically, Intuitive sent an e-mail seeking to "educate you as best we can to ensure
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1 contract compliance" including that "Legacy Good Samaritan Medical Center is likely in breach of
2 contract with Intuitive Surgical due to the utilization of third party reprogrammed instrumentation."
3 Van Hoven Decl. Ex. 5 at pp. 1-2. Legacy Good Samaritan's President responded the same day,
4 confirming that "we are using some reprocessed parts at the recommendation of our CS leaders as
5 part of our overall work to reduce costs" but as a result of Intuitive "calling this to our attention[,]"
6 "[w]e have asked them to cease and desist." *Id.* at p. 1.

7 In sum, the state of mind of SIS hospital customers is relevant to this case, these statements
8 were made contemporaneously with the mental state to be proven, these statements are not being
9 presented for the truth of the matter asserted, and reams of independent evidence confirms the
10 reliability of these statements. Accordingly, Mr. Johnson should be permitted to offer evidence of
11 customer motive pursuant to Fed R Ev 803(3).

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13 Dated: December 11, 2024

McCAULLEY LAW GROUP LLC

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